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Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

OCTOBER TERM, 2001

LAWRENCE R. ROSANO,
beneficiary, donee,
Petitioner,

-v-

UNITED STATES OF AMERICA, AND
THE MERIT SYSTEMS PROTECTION BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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69 pp

QUESTIONS PRESENTED

1. Although substantially different than the "clearly erroneous" definition, thereof, as applied in *Goehring v. Brophy,* 94 F.3d 1294, 1299-1300 (9th Cir. 1996), certiorari denied by this Court on March 31, 1997, here, in this petition, the precise and accurate definition of an unduly burden on the free exercise of religion under the Federal First Amendment to the United States Constitution is based upon *Sherbert v. Verner*, 374 U.S. 398 (1963), reaffirmed in *Thomas v. Review Board of the Indiana Employment Security Division et al* [hereinafter, known as "*Review Board*"], 450 U.S. 707 (1981), which moreover, Congress reaffirmed in 1993 its reliance on *Sherbert* by enacting the Restoration of Freedom of Religion Act ["RFRA"]. 42 U.S.C. 2000 bb(b)(1). Against this background, the first question presented here is:

> Whether the Internal Revenue Service ["I.R.S."] placed an unduly burden on the free exercise of religion upon "both beneficiaries, i.e., my brother, Robert, and myself, upon all donees, and upon my Mother, Mary Rosano, the donor, posthumously" [hereinafter, known as "the parties"], by ruling in 1993 that certain non-charitable gift checks for $10,000 or less per person per year which were issued before, yet cashed after, my Mother's death were not deductible from the gross estate for Estate Tax purposes, precisely, because my Mother "could have" revoked, even though, *in principle, only,* any or all of the non-charitable gift checks in question at any time prior to her death, which was due to terminal pancreatic cancer, during which time she issued all non-charitable gift checks in question.

2. Whether the burden of proof was rather on the United States-Defendant, thereby, requiring a retrial.

3. Whether the Merit Systems Protection Board has jurisdiction over ruling by IRS, and/or the Office of Personnel Management in context.

and/or the pattern of prohibited personnel practices governing a state civil case, and/or all past and current state criminal proceedings, and/or convictions, including the pending one, including stalking, and/or otherwise as indicated, herein, based on section 1206(h), as described in the Congressional Record-House, p. 33765, October 5, 1978 at A-26; or otherwise.

4. Whether the Merit Systems Protection Board has jurisdiction over the ruling by the IRS, and/or the Office of Personnel Management, both in context, pursuant to the MSPB decision on December 12, 1980, and/or the MSPB worksheet, demonstrating the fact that only 2 of 3 Board members decided it, by denying jurisdiction to review my appeal for termination in 1980.

5. Whether the petitioner is entitled to reasonable attorneys' fees and costs.

6. Whether the doctrine of Equitable Recoupment is applicable to gift check #179 for $20,000 to Washburn, as a matter of law and to determine the significance, thereof, to Petitioner.

7. Whether the beneficiaries are entitled to prevail on their estate gift tax deficiency refund, penalty, and interest, claim, inter alia, because they possessed a substantial adverse interest in the Estate of Mary Rosano, as a matter of law, at the time all non-charitable gift checks were issued before her death, under the IRS Rules, and/or otherwise regulations, included in 26 CFR 25.2514-3.

8. Whether United States District Court, Judge Johanna Seybert, and Magistrate Judge Orenstein. should have recused themselves under the circumstances, pursuant to *In Re Murchinson*, 349 U.S. 133, 136 (1955), upon which basis, retrial should be ordered on all cases.

9. Whether the New York State Nassau County Judicial Rules, which apply to criminal and/or civil court, are unconstitutional, per se, because they require the sitting judge to hear and decide whether he or she has subject matter jurisdiction; during the proceedings, and/or

after judgement; is a violation of *In Re Murchinson*, 349 U.S. 133, 136 (1955).

10. Whether this Court should review my justification defenses, as a matter of law, under New York State Public Law 35.05, and/or review all state decisions, both criminal and civil, including the pending hearing and/or trial by Judge John G. Marks, to determine whether each Court in question lacked subject matter jurisdiction, to convict me of a crime, and/or place a default judgement against me in 1993.

11. Whether each argument raised in this petition for a writ of certiorari to support the relation-back doctrine is necessary and sufficient to prove its validity, and was sabotaged by Congress.

12. Whether the petitioner and/or parties can sue the proposed defendant-attornies, either governmental or not, under New York State Judiciary Law 487 in a 1983 USC 42 lawsuit because liability is proven, as a matter of law.

elected or not

13. Whether any or all governmental officials responsible in any way for the governmental funding of abortion and contraception must be dismissed from governmental service, *ab initio*, for violating the free exercise clause to the federal first amendment under my precise and accurate definition of a burden on the free exercise of religion, as described, herein.

Attorneys

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PARTIES

The Petitioner is as follows: I am Lawrence R. Rosano, Pro Se, inter alia, a legal researcher who, also, created and developed all the legal arguments in this case. I am also a 50% beneficiary, donee, and taxpayer of one-half of the necessary tax to pay in order to entitled the estate to sue the U.S.A. in U.S. District Court.

In the U.S. District Court, I was a Plaintiff, Pro Se, initially, but denied Plaintiff status, nevertheless, precisely because the U.S. District Court, Judge Seybert, refused to recognize that I was a one half taxpayer, as indicated, above, yet, without giving me a reason for doing so during the litigation; however, as a pretext, issued a decision titled, *Lawrence R. Rosano v. United States*, 1999 WL 550313 (E.D.N.Y.), holding I would have had status as plaintiff if I had paid, at least, part of the tax required to sue in federal court, which, in fact, I did; yet, nevertheless, she failed to rule on my Plaintiff status as a donee; notwithstanding the I.R.S. lost the entire file from the 1993 I.R.S. audit, and I supplied all checks in evidence, including, but not limited to, the check which I paid one half of the estate tax needed, as indicated, above. I am a class representative under *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3rd Cir. 1971) and I represent myself, my brother, the Executor, and all donees; and/or my Mother, posthumously; accordingly, and all similarly situated estates, as well. Subsequently, in the Second Circuit Court of Appeals, I was allowed only to be an amicus curiae, whereas my brother, Robert R. Rosano, the Executor, remained the Plaintiff, represented by Mr. A. Lawrence Washburn, Jr., Esq., as was done in the U.S. District Court. Carpenter, Bennett, & Morrissey was the law firm who prepared our 1995 IRS Memo, yet based on my legal research and development

The respondent is the United States of America, for the I.R.S., represented by U.S. Attorneys Mr. Berkowitz and Shapiro in U.S. District Court, and Betsy Erickson in the Second Circuit. The respondent is, also, the M.S.P.B. who denied jurisdiction to my appeal from a termination based on religious discrimination, as a probationary employee. *Rosano v. Dept. of Navy*, 699 F.2d 1315 (Fed. Cir. 1983).

LAWRENCE R. ROSANO,
beneficiary, donee,

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DECISIONS BELOW

The published decision by the United States District Court, Judge Seybert, Magistrate Judge Orenstein, denying the estate gift tax deficiency refund, penalty and interest, is cited as *Rosano v. United States*, 67 F.Supp.2d 113 [E.D.N.Y. 1999]; who also, in *Lawrence R. Rosano v. United States*, 1999 WL 550313 (E.D.N.Y.), erroneously, disqualified me as Plaintiff. On appeal, *Rosano v. United States*, 245 F.3d 212 [2nd Cir. 2001], decided in the Court of Appeals for the Second Circuit, affirms the denial of the estate gift tax deficiency refund, penalty and interest, and is included in A-1 to A-5. The Court of Appeals issued its decision on April 6, 2001. A Petition for Rehearing En Banc was made by Petitioner which was denied on August 3, 2001. On September 25, 2001, by letter, Justice Ginsburg extended the time to file my writ by 60 days, which brings the last date to file this petition for a writ of certiorari by December 31, 2001.

Rosano v. Dept. of the NAVY, 699 F.2d 1315 (Fed. Cir. 1983); *Rosano v. Secretary of the NAVY*, unreported decision, No. 83-6384 (9th Cir. 1984); *Rosano v. United States*, 9 Cl.Ct. 137 (1985).

JURISDICTION

Even as an amicus curiae, I had standing to present all of my arguments, based on a new legal theory on appeal under all the factual circumstances described in this case, not that I was not, also, entitled to Plaintiff status, besides. Note, *Olegario v. United States*, 629 F.2d 204, 216, n. 8 (2nd Cir. 1980), where the Second Circuit declared this:

> "*Green v. Brown*, 398 F.2d 1006, 1009 (2nd Cir. 1968), in which this court stated that 'we would not ordinarily be receptive to attempts to litigate issues not raised in the trial court,' .. The *Green* court acknowledged that this is not an absolute rule, a point recently reiterated in *Adato v. Kagan,* 599 F.2d 1111, 1116 (2nd Cir. 1979). Indeed, in *Green*, the SEC which had entered the case as amicus on appeal, was permitted to present a new legal theory to the appellate court. Like *Green*, this case involves an important federal issue.."

I am a class representative under *Hackett v. McGuire Bros.*, 445 F.2d 442, 446-47 (3rd Cir. 1971). Under *Allen v. McCurry*, 449 U.S. 90 (1980), I can raise issues which the criminal court is both unwilling, and/or incompetent under *Warren v. Byrne*, 699 F.2d 95, 98 (2nd Cir. 1983), to decide, such as, discrimination, and federal issues which criminal courts, in my case, have always demonstrated bad faith, precisely, by prosecuting me in a court which lacked subject matter jurisdiction, which since 1986, covers over 14 convictions, one money judgment in state civil court, and the pending state criminal malicious prosecution is in a court which lacks subject matter jurisdiction. Yet, in 1998 and 2000, Judge Seybert, the trial judge in this case, refused to remove these cases to her Court based on *Younger v. Harris*, 401 U.S. 37, 49-51, 91 S.Ct. 746 (1971) [holding that, absent a showing of bad faith by the prosecution, federal courts are to abstain from interfering with pending state criminal proceedings due to the important state interests implicated and the availability of review of constitutional claims in the state court]because she did not equate bad faith to a Court which prosecuted me without subject matter jurisdiction. But, because under these facts, and this pattern for over 15 years, even *Younger* held "It plainly appears that this course would not afford adequate

protection." *Id*, at 751.

Moreover, even though "to support the judgment of reversal on other grounds not passed on by the Court of Appeals ....., These grounds raise only issues of law not calling for examination or appraisal of evidence and we will consider them", *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 71 S.Ct. 259, 261 (1951). This Court has jurisdiction also under *Flast v. Cohen*, 392 U.S. 83 (1968), 8912 U.S.C. 5, and 28 U.S.C. section 1254(1) to review the judgement of the U. S. Court of Appeal. Also, under 7702(f) U.S.C. 5 at A-24, I can sue the M.S.P.B. because I timely filed, although against the wrong agency, concerning my unlawful termination in 1980. *Rosano v. United States*, 9 Cl.Ct. 137 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Federal First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In 1998, during litigation in U.S. District Court, the United

States notified the Plaintiffs that the I.R.S. lost the entire file on the Estate of Mary Rosano. Consequently, I exclusively supplied the entire evidence in the case at bar, such as the 1993 IRS Closing Letter, and copies of the front and back of each of the 58 non-charitable gift checks my Mother issued within one month before Sunday, January 21, 1990 when she died of terminal pancreatic cancer known to exist since November 30, 1989.

On and between December 29, 1989 and about January 8, 1990, my Mother issued these 58 non-charitable gift checks for $10,000 or less per person per year, as follows: 16 of them were issued by a bank, 42 issued by a Merrill Lynch Cash Management Account [hereafter, known as "CMA"]. The aggregate value of the these gifts amounted to over 25% of the gross Estate of Mary Rosano.

In 1992, the I.R.S. changed its regulations, by enacting 26 CFR 25.2511-1(g)(1), regarding non-charitable gift checks described, as follows: "First, the absence of donative intent does not prevent the imposition of the gift tax", 1999 Rutgers Law Review, p. 186, by Professor Mark R. Siegel. The legal effect of this IRS regulation, especially, on deathbed gift checks, has never been litigated until now.

In 1993, the I.R.S. audited the Estate of Mary Rosano. The IRS Closing Letter mentioned only 4 of the 16 bank checks, thereby, deducting from the gross estate the unmentioned 12 gift checks under Federal Rule of Evidence 803(6-7) at A-17. 2 of these 4 bank checks were 2-1989 Gallucci gift checks which were issued and deposited on December 29, 1989, and cleared on January 3, 1990. The IRS deducted this amount from the gross estate, but in 1990, when cashed, not in 1989 when issued and deposited, whereas the other 2-1990 Gallucci gift checks were cashed <u>after</u> my Mother's death, and yet, even the U.S. Attorney, Berkowitz, in U.S. District Court, conceded that the IRS "related back" these two checks to when issued.

The IRS also mentioned, summarily, all the CMA gift checks; except one of the 42 CMA non-charitable gift checks issued, #179, for $20,000, was issued to Mr. A. Lawrence Washburn, Jr., Esq., only the first $10,000 of which was deducted from the gross estate for Estate

Tax purposes. This was the only CMA check the IRS in 1993 related back as a gift.

In 1993, during the audit, I was unable to participate since I served a prison sentence of 96 days, after conviction in 1992, mysteriously, in a court without subject matter jurisdiction, on a charge trumped up by the Nassau County District Attorney, Denis Dillon, namely, for Obstruction of Governmental Administration, precisely, for not handing a female Police Officer my car keys when requested on a car stop for DWI, when, as a matter of fact, and health, I haven't taken a drink in over 30 years. After I was released on May 28, 1993, just days after the estate audit was completed, I met with the IRS auditors and vowed to fight our case in federal court, yet, only after I was unable to convince them of my position by raising some of my arguments presented here based on "plain and unambiguous" existing IRS regulation, and/or pertinent law, such as *Bacchus v. United States*, an unreported case (I). N.J. 1985. 57 A.F.T.R.2d 86-1519. 86-1 USTC par. 13,669), the U.C.C. argument, and 26 CR 25.2511-2(a) at A-18. Briefly, I argued that if the gift tax, and therefore, the gift tax deduction, attaches even though the donee "is not known or ascertainable", as stated in 26 CR 25.2511-2(a), then, the time that the gift tax exclusion is made occurs "when intended" which is exactly what *Bacchus* held, which I argued, again, in the Second Circuit in my September 5, 2000 Amicus Curiae memo at pages 13-14. Subsequently, the IRS agents never responded, but yelled at me.

In 1995, the Executor filed a memorandum prepared by a law firm, Carpenter, Bennet presented to the I.R.S. raising only several arguments, yet, all of which resulted from some of my legal reasoning, and legal arguments. The IRS never responded one way or the other.

In 1995, an appellate New York State Court decided *Pinasco v. Ara*, 219 A.D.2d 540, 631 N.Y.S.2d 346 (1995) holding for the first time that Merrill Lynch CMA checks were materially equivalent to bank checks to be treated, likewise.

In 1997, this 1995 IRS Memorandum was attached to the complaint filed in the U.S. District Court, Eastern District of New

York. In 1999, in her final decision, Judge Seybert overruled the entire 1995 IRS memorandum, allegedly, but, precisely, because the estate attorney, Mr. A. Lawrence Washburn, Jr., characterized our 1995 memo and, thereby, Plaintiffs position, as extending the law with my creative arguments, even though Washburn knew the contrary. *Rosano v. United States*, 67 F.Supp.2d 113, 116 [E.D.N.Y.]. In addition, Judge Seybert did not recognize me as a Plaintiff, even though I presented that I made a payment of one half the tax in order to sue in U.S. District Court; a point, as mentioned, before, Judge Seybert conceded that if only she had known, I would have been Plaintiff. *Lawrence R. Rosano v. United States*, 1999 WL 550313 (E.D.N.Y.). In 2001, in its final decision, the Second Circuit, also, never referred to any of our arguments included in our 1995 IRS memorandum, either, although that court allowed me to file an amicus curiae memorandum of 15 pages, although without exhibits attached.

ORAL ARGUMENT

On January 17, 2001, the Second Circuit allowed me to give one half the minutes at our oral argument, where and when I introduced for the first time on appeal my definition of the burden of the free exercise of religion, which is substantially different from that understood by the Second Circuit, not that the Ninth Circuit is any better. Specifically, I asserted that the IRS placed an unduly burden on the free exercise of religion upon the parties, when it ruled that all non-charitable gift checks cashed after my Mother's death could not be deducted from the gross estate for Estate Tax purposes, precisely, because my Mother "could have" revoked any or all of them before her death, even if, in principle, only. In response, Second Circuit Judge Newman erroneously corrected me by stating that the IRS did not rule that my Mother "would have" revoked, but, merely, that my Mother "could have" done so. In what remains as one of the crucial portions of this writ, then, immediately, thereafter, I rebutted Judge Newman's erroneous interpretation[1] of the burden, thereof, by affirming that

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[1]As a side point, there is no IRS-, or otherwise, regulation which indicates that the governmental benefits in question are unavailable if the donor "could have" revoked the gift checks, even if, principle only; however, certain case

"could have" was both the precise and accurate definition, thereof, pursuant to *Sherbert v. Verner*, 394 U.S. 398 (1963). However, neither Judge Newman nor the other panel judges ever allowed me to explain what might have remained nebulous, as far as their understanding of my precise and accurate definition of the burden. Against its clear precedent in *Green v. Brown,* 398 F.2d 1006 (2nd Cir. 1968), an amicus curiae, such as myself, has standing to present a new theory for the first time on appeal. I would have explained it further, beforehand, had I not been arrested for trespass on May 23rd, 2001, and subsequently, subjected to malicious prosecution which required me to represent myself, Pro Se, during the time I had to, also, prepare my Amicus Curiae memo which, consequently, disturbed my concentration to do so. This malicious prosecution, as were over the fourteen other arrests, most for trespass, since 1986, and a civil case, have all been held in a court without subject matter jurisdiction, no less. Nevertheless, perhaps, the Second Circuit panel did not need explanation, precisely, because they bought my arguments. In fact, under the Federal Rules of Evidence, the Second Circuit's silence was their own refutation, and this is one of the many arguments presented in this petition.

STATEMENT OF FACTS

In 1986, March, while preparing my Opening Brief, on appeal from *Rosano v. U.S.*, 9 Cl.Ct. 137 (1985), to the Federal Circuit Court of Appeals, working in the Library of Adelphi University where I had worked as an alumni on P.C. computers and doing legal research for the year before, I was arrested for allegedly trespassing, even though I possessed a valid ID card. I was arrested, thereafter in April, May and August, tortured by Adelphi University in concert with Garden City Police who looked the other way. My concentration was greatly disturbed and consequently, I lost my appeal. *Rosano v. U.S.*, 800 F.2d 1126 (Fed. Cir. 1986). I was arrested, again, twice in 1987 and once in 1988, with torture by Adelphi University Security Guards and Garden City Police at each arrest.

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law cites this as a rule, which, therefore, is "entirely judicially created", Id., 213, to the contrary of the Second Circuit.

Between 1987 and 1988, I was arrested while engaged in first amendment conduct four times and tortured, in similar fashion, on campus at St. John's University, Jamaica, Queens, New York, where on one arrest, I possessed an official ID card to take a personal computer course, but tortured and excluded, nevertheless. On another arrest, while attending noon day Mass in the Our Lady of Lords Chapel, a security guard, Mr. Carbonaro, grabbed my arm, even before Mass ended, and carried me outside where I was arrested, even though I caused no disturbance. In 1990 or 1991 I sued St. John's University in U.S. District Court, but unable to pursue it because bogged down with the lawsuit I had previously against Adelphi University. In 1990, March 10, just over a month after my Mother's death, due to investments I had made, I walked out of the Dime Savings Bank in Franklin Square, New York, with a cashier's check for $220,000. However, three days later, TSSG, Dreyfus informed me (petitioner) by Letter at A-25, dated in December, 1991, that the check I had cashed was, in fact, NSF, who made the ultimatum, therein, to either pay up money that TSSG/ Dreyfus alleged I kept, illegally, or else, Dreyfus would inform the IRS. I never paid TSSG/Dreyfus. To the contrary, I discovered as a matter of law, Dreyfus practiced illegal wire and bank transfers in concert with each other, illegally, so much so that I am entitled to millions of dollars as a result. In 1996, or thereabout, New York State Supreme Court held I was not entitled to money, but never decided, no less addressed, my argument that the civil court that issued the default judgement against me in 1993 lacked subject matter jurisdiction, which if my argument was upheld, I would recover money damages against all involved. Moreover, now, the illegal New York State Judicial Rules in criminal and civil court require the sitting judge to determine whether he/she had subject matter jurisdiction. Yet, this rule is unconstitutional, because if the judge held a lack of subject matter jurisdiction, liability would be self-created against this judge, thereby, giving the judge a stake in the outcome, a cause for recusal.

This issue was never raised before and I raise it here in this writ. This Court has held that "'[T]o perform its high function in the best way "justice must satisfy the appearance of justice"' *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942

(1955), *citing, Offutt v. U.S.*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954)." *Bilello v. Abbott Laboratories*, 825 F.Supp. 475, 478 (E.D.N.Y. 1993). Therefore, the judge in question deciding a case where he has a heavy stake in the outcome of that decision is, per se, prejudicial and may not hear and decide the case. *In re Murchison, supra*. In fact, currently, New York State District Court Judge John G. Marks, 99 Main Street, Hempstead, New York, ordered me to have a competency hearing[2], after I submitted to him a lot of legal memos and briefs necessary for my justification defense that I intend to raise in his court. However, currently, Judge Marks is also the judge presiding over my competency hearing that he ordered in the first place. In November, 2001 he refused to recuse himself. Yet, this prejudice, in different forms, has existed since 1986 when first arrested for criminal

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[2] Even though ten (10) months, before then, Judge Jaffe held that I was competent to stand trial and represent myself, Pro Se. There, Judge Kleiwer ordered the competency hearing, based on my statement to her in the court that "I did not understand the nature of the charges against me", precisely, because arrested 20 days after May 3, 2000, in a parking lot, open to the public, for trespass, whereas all my prior arrests were on premises I was accused of unlawfully trespassing, tortured, in part, for that purpose. Trespass conviction can not be had unless the order of exclusion is lawful. Here, *in addition to a lack of subject matter jurisdiction*, order of exclusion is unlawful because this retaliatory religious discrimination is basis for arrest on May 23, 2000, after Central High School officials perused leaflet I distributed to students leaving after school at sidewalk, since students gave the leaflet to school officials, verified by arresting Officer who showed me copy, thereof. Criminal Court refuses to transfer jurisdiction to decide this issue of religious discrimination to U.S. District Court under 1983 USC 42, pursuant to *Wanner v. Byrne, supra*, and, in turn, Judge Seybert denied my 1998 Removal Action when considering, inter alia, other similar convictions; and denied my 2000 Removal Action, inter alia, to remove this current criminal proceeding to her Court because of *Younger*. Yet, *Younger* presupposed state court bad faith was not present; whereas, if it was, even *Younger* held to remove, to her contrary. **NEVERTHELESS, Judge Seybert was prejudicial since** 1998 to decide our Estate case in 1999, **precisely, because** she reviewed my *March 10, 1990* TSSG/Dreyfus controversy, allegedly, cashing NSF check for $220,000, thereby, painting me as a NSF-check-scam con artist who only three months, before, made a similarly illegal "check-scam" of non-charitable gift checks my Mother, allegedly [?], issued on her deathbed, no less. If that's not prejudice, then, what is?

trespass while engaged in first amendment conduct on Adelphi University, thereby, abridging my Federal Right Petition, in addition, as follows:

In 1986, as mentioned, above, my four (4) arrests for criminal trespass while, exclusively, pursuing my federal case at Adelphi University cost me my appeal of *Rosano v. U.S.*, 9 Cl.Ct. 137 (1985) which was denied in 1986, and this Court denied cert in 1987, *Rosano v. U.S.*, 480 U.S. 907. Again, in 1997, April 15, I was excluded from Hofstra University, where I did all my legal research, similarly for 3 years before, but then, looking up and researching *Goehring v. Brophy, supra,* which this Court denied cert on March 31, 1997. I needed to point out this case to this Court since my legal reasoning, as here described, conflicted with it. I did get my writ in by May 15, 1997, but had to hire an attorney to do so, who had not enough time to include my Constitutional issues, namely, my justification defenses which was successfully made in U.S. District Court, 1993. Cert. was denied, too. Again, now, for the third time, on May 23, 2000, I was arrested for criminal trespass, and yet, now, also, stalking a 17 year old senior high school student back on May 3, 2000 when on Central High School property in Valley Stream, N.Y. Unable to contact her on May 3rd, between then, and the May 23rd arrest, I leafleted my legal memo and explanation, in part, made in this writ, engaged in first amendment conduct, informing high school students leaving school, the controversy of abortion coverage in group health insurance violates the federal first amendment as described in this writ. The criminal trial for that had been adjourned until January 8, 2002. Judge Marks refuses to consider that I am appealing a very important case in this Court, and refuses me to represent myself, Pro Se, which I want to do. Because this criminal case involves a federal first amendment challenge based on my legal discovery of the burden, thereof, I am unique, and as a class representative of Prolifers similarly situated, I and my class will be irrefutably harmed, since in this area, time is of the essence. The statute F.A.C.E. presupposes not to violate Federal First Amendment rights. Yet, to the contrary, F.A.C.E. is a bill of attainder under my legal reasoning. Yet, unless I rid myself of this malicious prosecution in every case held in a court without subject matter jurisdiction, I will have no justice. My past appeal, *Rosano v. Adelphi University*, makes

arguments I would raise here, except that I successfully raised a justification defense, in U.S. District Court, Judge Amon, 1993, under *Allen v. McCurry, supra*, yet, that Court never recognized it although I can argue it thoroughly, using the Federal Rules of Evidence, raised in this writ. This is what I would have included in my writ 1997, had I not been arrested on May 15, first excluded on April 15, 1997. In fact, in Nassau County District Court, before Judge John G. Marks, although I really believe, as a matter of law, it should be held in this Court, I intend to argue justification defenses under New York State Public Law 35.05 that had I not been excluded from Hofstra University Law School Law Library between April 15 and May 15, 1997, I would have prepared my own petition for a writ of certiorari in this Court and included my justification defenses, which were, judicially, ignored by both the United States District Court, Judge Carol Amon and the Second Circuit to, inter alia, outlaw abortion and contraception, per se, and/or as mandatory coverage in group health insurance. Briefly, under the fourth linchpin element of justification, *People v. Chachere*, 428 N.Y.S.2d 781 (D.Ct., 1st Dist. 1980), the District Attorney, or perhaps, more appropriately, the United States, would have to disprove beyond a reasonable doubt that this Court would have illegalized abortion and contraception, per se, and/or as mandatory coverage in group health insurance [and illegalize affirmative action], all per se, as raised originally, in *Rosano v. United States*, 9 Cl.Ct. 137 (1985).

Even though Judge Marks lacks subject matter jurisdiction, I'm still entitled to raise justification. *People v. McManus,* 505 N.Y.S.2d 43 (Ct.App. 1986); and thereby, in turn, in this Court, precisely, because the decision would have to go up to this Court, anyway, since it would conflict with a greater number of cases, than my definition of the free exercise of religion would. In fact, a justification defense, as a matter of law, must precede a trial, thereon. This Court should, therefore, at least, decide my justification defense, as a matter of law, but, even so, several courts have made decisions, in part, on it, and this Court should review the issue en toto. *Kiefer* allows this Court to do so, moreover.

REASONS FOR GRANTING THE WRIT

I.

IRS PLACED UNDULY BURDEN ON FREE EXERCISE OF RELIGION UPON ALL PARTIES BY RULING THAT MY MOTHER "COULD HAVE" REVOKED, EVEN IF, IN PRINCIPLE, ONLY, ANY OR ALL GIFT CHECKS IN QUESTION AT ANY TIME BEFORE HER DEATH, DUE TO HER TERMINAL ILLNESS, NO LESS.

On January 17, 2001, at oral argument before the Second Circuit panel, I - the Petitioner - accused the IRS in 1993, and thereafter, of placing an unduly burden on the free exercise of religion upon the parties because the ruling by the IRS [disqualifying the Estate of Mary Rosano from the gift-tax exclusion benefits (i.e., not deducting the value of the non-charitable gift checks in question from the gross estate for Estate Tax purposes), precisely, because my Mother "could have" revoked any or all of them at any time before her death, even if, in principle, only] forced the parties to choose between refusing to be willing to accept the remote possibility, even though *in principle, only*, to do what both the United States and the IRS were both prohibited to force the parties to do, namely, to violate our religious beliefs in practice by calling my Mother a liar, on her deathbed, no less, and consequently, nevertheless, forfeit the payment, both beneficiaries equally shared in paying, for the gift tax deficiency, penalty and interest, and my spending countless hours for years since the 1993 audit in legal research, and legal development, and countless hours in secretarial work, which caused, not only delay, but, interference in my life for the past 8 years, in order to create and maintain litigation, by pursuing the case at bar, in the public interest, no less, on the one hand, and be willing to accept the remote possibility to violate our religious beliefs, even though, *in principle, only*, as described, above, in order to, reluctantly, settle the estate, and accept work, on the other hand.

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship. [citing *Sherbert v. Verner*, 374 U.S. 398, 404(1963)]."

Thomas v. Review Board, 450 U.S. 707, 716-717 (1981).

First, as a practical matter, in order to establish a claim that a burden upon the free exercise of religion existed upon the parties to make liable the IRS for Constitutional violations, the petitioner must, first, prove that the governmental gift-tax exclusion benefits were always otherwise available to the estate. As a basis, note this:

> "More that 30 years ago, the Court held that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an *otherwise available* (emphasis, added) public program."

Thomas v. Review Board, supra, at 716.

Secondly, and finally, the petitioner will prove that the IRS denied the parties these otherwise available governmental benefits in question by placing an unduly burden on the free exercise of religion, pursuant to *Sherbert v. Verner, supra.*

A. ARGUMENT FOR THE FIRST TIME ON APPEAL

On her deathbed, even though Judge Newman used it to the contrary, nevertheless, my Mother "could have" revoked any or all non-charitable gift checks in practice, no less in principle, only, as a matter of law, considering all non-charitable gift checks were, precisely and accurately, gifts causa mortis, which comment #3 to New York State UCC 4-405 at A-10 declares this: "This section ... is not intended to affect the validity of any gifts causa mortis or other transfer in contemplation of death,..."

> "The only differences between an *inter vivos* gift and one *causa mortis* are that in the latter (1) the gift must be made when the donor is apprehensive of death from some present illness or impending peril, (2) **it is revocable by the donor in (her) lifetime (emphasis, added)**, and (3) the gift is revoked in law if the donor does not die from such illness or peril (citations

omitted)."

First National Bank of Lockhaven v. Fitzpatrick, 29 A.D.2d 450, 289 N.Y.S.2d 314, 320 -321(4th Dept. 1968).

By observation, stating that my Mother "could have" revoked any gift check, *even if, in principle, only*, is identical to saying "(2) **it is revocable by the donor in (her) lifetime**", *Id.* Therefore, Judge Newman pretended that my Mother's gift checks were not gifts causa mortis, whereas, at oral argument, I plainly and unambiguously described that they were. In addition, also, in my Amicus Curiae Memorandum, on page 1-2, footnote #2, I included text and reference to the section on deathbed gift checks, as stated in Professor Barclay Clark's treatise, The Law Of Bank Deposits, at A-11 to A-16 which indicated the type of gift check at issue on appeal.

Yet, in order to set the record straight to be able to prosecute the governmental and non-governmental attorneys in question, under New York State Judiciary Law 487 at Appendix A-10, and sue them all in a civil action, no less, I included other necessary and sufficient arguments based on the Federal Rules of Evidence and otherwise.

OTHER ARGUMENTS BASED ON:

B. ORAL ARGUMENT

From another perspective, is the fact that whether "could have" or "would have", in context, as above described, precisely, defines a burden on the free exercise of religion is besides the point; namely, that it is clear, nevertheless, that Judge Newman, as a de facto defender of the IRS' ruling in question, presupposed that the governmental gift-tax exclusion benefits were always otherwise available, even though contrary to the Second Circuit's decision in *Rosano v. United States*, 245 F.3d 212 (2001) because Judge Newman implied "would have", in the context used, is a violation of the free exercise of religion under the Federal First Amendment, and, in turn, in saying so, the benefits had to be otherwise available, or else, he would not have said so.

Then, Judge Newman, nevertheless, concedes that the non-

charitable gift checks in question should have been deducted from the gross estate for Estate Tax purposes, as a matter of law, contrary to *Rosano v. United States, supra*, and therefore, Judge Newman's remarks were "against-interest".

Therefore, under Federal Rule of Evidence 801(d)(2)[3] at A-17, the Plaintiffs prevail in this case. Moreover, precisely, because a member of the Second Circuit, Judge Newman, made the remark, uncontroverted by his brother judges on the panel, no less, then, this substantial contrary evidence is what the Court really believed to be the law, not what the Second Circuit issued in *Rosano v. United States, supra,* which came after. What this really means is that the Second Circuit, judicially, created fraud upon its own Court.

C. AMICUS CURIAE MEMO NEVER REBUTTED.

Under Federal Rules of Evidence 803(6), -(7) at A-17, the absence of evidence by the Second Circuit in *Rosano v. United States, supra*, refuting any or all of my arguments raised in my Amicus Curiae Memorandum, which is considered a business record, is negative substantial evidence that the Second Circuit, as a matter of law, thereby, could not disprove any or all of my arguments raised, therein, in as much as *Green* imposed an obligation to do so under the circumstances. Consequently, all arguments, therein, are upheld; if not, also, because this Court should recognize, as a matter of law, that the proper burden of proof belonged on the United States, at least, as of

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[3]Federal Rule of Evidence, Rule 801 at Appendix A-17.

(d) Statements which are not hearsay

A statement is not hearsay if -

(2) Admission by party-opponent

The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency, or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

1995 [*Pinasco*] under the circumstances, as explained in answer II. The Second Circuit declared these statements, below, which presupposed that all averments, arguments and facts in my Amicus Curiae Memorandum were valid, as a matter of law, precisely, by what the Court did say, and what it did not.

(1) CA2: No case supports relation-back, cashed after death.

The Second Circuit, also, declared this at 245 F.3d, 213:

"The estate has pointed to no court that has allowed payment to relate back to the date of delivery if the donor was deceased on the date of actual payment and the donee was not a charitable entity." cf A-3 to A-4

(i) ***Smith v. Gentilotti***: Yet, to the contrary, first, I pointed in my amicus curiae memo at page 11, to the authority, *Smith v. Gentilotti*, 359 N.E.2d 953 (Sup. Jud. Mass. 1977)], holding that a $20,000 non-charitable gift checks, post dated, no less, issued before, yet deposited and cashed after donor's death, was excluded from the gross estate for Estate Tax purposes.

(ii) ***Rosano v. United States***: In the case at bar, as a matter of law, since 1995, all non-charitable gift checks cashed after my Mother's death related back, proven as follows:

As declared, above, 14 of 16 non-charitable bank gift checks related back to the date issued, even though cashed after, my Mother's death. In U.S. District Court, the U.S. Attorney, himself, Berkowitz, conceded that 2-1990 Gallucci gift checks related back. And, because 12 bank non-charitable gift checks were not mentioned in the 1993 IRS Closing Letter, this absence of evidence is substantial evidence that all these checks were deducted from the gross estate under Federal Rule of Evidence 803(6), -(7) at Appendix A-17.

(iii) ***Pinasco v. Ara***: Moreover, I raised the argument that after 1995, the United States did not reflect the changes in the law, pursuant to *Pinasco v. Ara*, 219 A.D.2d 540, 631 N.Y.S.2d 346 (1995)(also concluding that Merrill Lynch CMA checks were materially equivalent to bank checks). Thus, since 1995, the IRS did not equally apply "existing" case law [*Pinasco*] to relate back all CMA non-charitable gift checks, in a presumption of regularity, as it did, in a similar fashion, when the U.S. Attorney, Berkowitz, applied *Estate of Metzger v. Commissioner*, 100 T.C. 14 (1993); *Estate of Metzger v United States*, 38 F.3d 118 (4th Cir. 1994) to the 2-1989 Gallucci non-

charitable gift checks, thereby, relating them back, even though in the 1993 audit, the IRS, originally, did not. Yet, had it only done so, all non-charitable gift checks, both CMA and bank, cashed after my Mother's death should have been held to relate back under the IRS' own presumption of regularity[4].

(2) CA2: Relation-back doctrine is entirely judicially created.

CA2: No legislative authority. 4-4

"The doctrine of relation-back is entirely judicially created." *Rosano v. United States*, *supra*, 213. Yet, to the contrary, in my Amicus Curiae memo, at pages 1-3, I introduced a discussion for the first time ever in this area of estate law, New York State Uniform Commercial Code ["UCC"] 4-102 at A-8, which expresses the legislative intent to relate back non-charitable gift checks cashed after the donor's death under UCC 4-405 at A-8, which governs UCC 3-409 at Appendix A-8, which states that "A check .... does not .... operate as ... funds in the hands of the drawee." Therefore, had the Second Circuit only considered this argument in my amicus curiae memo, the Court would never have made the irresponsible remark, above, namely, that the relation back doctrine is "entirely judicially created", but the contrary is true, as proven, here. See Professor Barclay Clark's treatise, The Law of Bank Deposits, at A-11 to A-16.

(3) Unequal treatment between Charitable-, and Non Charitable-, and/or, between Bank-, and Merrill Lynch CMA-, gift checks.

In my Amicus Curiae Memorandum, I raised *Estate of Spiegel v. Commissioner* [CCH Dec. 16,898 (M)], 12 T.C. 524 (1949)(citing cases, here, omitted)[two charitable gift checks related back, one

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[4] *Abrahams v. NYS. Tax Comm'n*, 500 NYS 2d 965,967 (S.Ct. 1986) held this

> "There is a presumption of regularity with respect to government agencies in that it is presumed they 'act honestly and in accordance with the law and do nothing contrary to official duty requires to be done.' Fisch on Evidence, Section 1134 ..... petitioner (I.R.S./UNITED STATES, in this case, added) has failed to produce substantial competent evidence to the contrary (*Rocktime v. Finance Administrator*, 75 A.D.2d 526, 426 N.Y.S.2d 773 [1980]."

issued in the year before the year cashed, but before the donor died, and the other issued in the same year, but before, yet cashed after, the donor died, added], acq'd, 1949-2 C.B. 3. In my Amicus Memo, I proved that *Spiegel*, although ab silencio, related back a non-charitable gift check, that is, a *Bradley* tax payment check which *Spiegel*, constructively, held would relate back, even without consideration attached.

Conclusively, the related back doctrine does not discriminate between charitable and non-charitable gift checks. Alternatively, the Second Circuit did, but, had nothing to refute my arguments. Federal Rule of Evidence 803(7) at A-17. Therefore, the IRS, unlawfully, discriminated against donees, depending on whether issued by a bank or CMA. Therefore, had the Second Circuit merely reviewed my amicus curiae memo, the Court would never have made those careless remarks, as indicated, above, without, at least, refuting my arguments.

DEFINITION OF BURDEN ON FREE EXERCISE OF RELIGION

Outside the context of unemployment compensation benefits, even this Court has not applied the precise and accurate definition of the burden on the free exercise of religion under *Sherbert*, for example, when denying certiorari to *Goehring v. Brophy, supra*, in 1997. I developed my legal discovery, below, pursuing *Rosano v. United States*, 9 Cl.Ct. 137 (1985), in opposition to religiously offensive mandatory abortion and contraception coverage in group health insurance which I now can argue places a heavier burden on the free exercise of religion than petitioner in *Sherbert*, thereby, proving that the Ninth Circuit's decision in *Goehring* is "clearly erroneous". Moreover, the additional significance for my raising *Rosano* will become evident as this petition unfolds. Nevertheless, this Court in *Sherbert* should have held the following:

MY DEFINITION, AS PER *SHERBERT V. VERNER*

The ruling by the unemployment compensation benefits' board [disqualifying from benefits Mrs. Sherbert who was fired from her job because of her refusal to work on Saturday in violation of her Faith]

forces her to choose between refusing to be willing to accept the remote possibility, even though, in principle, only, to do what both her employer and the State were prohibited to force her to do, namely, violate religion in practice by working on Saturday, and consequently, forfeit benefits, on the one hand, and be willing to accept the remote possibility to work on Saturdays, although, in principle, only, as indicated, above, in order to accept work, on the other hand.

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship. [citing *Sherbert v. Verner*, 374 U.S. 398, 404(1963)]."

Thomas v. Review Board, supra, 716-717 (1981).

As applied to the case at bar, which I previously had made, my above definition of the burden on the free exercise of religion stands as the derivative definition. However, the case at bar is unique since the burden is much heavier because whether the parties refused or accepted the religiously offensive belief in question, we didn't have a choice to refuse to be willing to accept the possibility of violating religion. The one we chose, namely, to sue the United States, will change the IRS policy, namely, to violate the law, under the color of law to pretend, allegedly, "upholding" the law. This is the reason why Plaintiffs, the parties, and similarly situated estates, besides those in the case at bar, are entitled to sue under 1983 U.S.C. 42 in a civil rights action.

II. BURDEN OF PROOF ON DEFENDANT, NOT PLAINTIFFS.

Although the Second Circuit did not do so, I discussed in my Amicus Curiae Memorandum at page 6,7, that the burden of proof should have been on the United States-Defendant. Under Federal Rules of Evidence 803(7), that argument also is affirmed, as all others are. Under Federal Rules of Evidence 803(6-7), the Second Circuit conceded, as a matter of law, my argument on a shift of burden of proof, based on *Pinansco* and the fact that all non-charitable bank gift checks that were cashed after my Mother's death, related back to the

date when intended [14]. Therefore, it was incumbent on the United States to disprove with contrary substantial evidence that these non-charitable gift checks did not relate back. See the holding[5] in *Abrahams v. NYS. Tax Comm'n*, 500 NYS 2d 965,967 (S.Ct. 1986).

III.

APPEAL RIGHTS FOR CATEGORY OF INDIVIDUALS, ETC.

> **"Special Counsel investigations of a pattern of prohibited practices.**
>
> Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary. .....
>
> The Senate conference substitute in section 1206(h) adopts the Senate provision. .... The Senate bill makes it a prohibited personnel practice to grant any preference or advantage not authorized by law, rule, or regulation to any person for the purpose of improving or injuring the prospects of any particular individual of 'category of individuals'. The substitute **omits** this phrase **but it is expected** [emphasis, added] that a pattern of activities disadvantaging a category of individuals would be actionable under this subsection." p. 33765, Congressional Record-House, Oct. 5, 1978 at A-26.

Petitioner proposes that the interpretation of this section, above, allows any individuals, not only federal civil service employees, such as I was in 1979-1980, to raise a claim against the IRS concerning the relation back doctrine, as here presented, and/or the claim, made,

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[5]See footnote #4 on *Abrahams*.

here, also in this writ, that the old definition of the burden on the free exercise of religion was erroneous, as proven, here, and/or that the FHB program was unconstitutional; and/or, this individual in question could do so under 5 CFR 1201.56(b)(1),(2), -(3) at A-22,23.

IV. APPEAL RIGHTS FOR FEDERAL EMPLOYEES

Under the circumstances, I am entitled to raise, not only my definition, but my application of my definition, thereof, as an affirmative, under 5 CFR 1201.56(b) at A-22, A-23, based on this lawsuit, raised for the first time, namely, *Rosano v. Merit Systems Protection Board*, presented to this Court in this petition for a writ of certiorari.

In 1980, I was unlawfully terminated from federal employment as a civil engineer on probation for insubordination, yet, officially, for poor performance, based on conditions arising prior to my appointment, and subsequently, yet timely, filed my lawsuit, except with the wrong agency. Now, under 5 U.S.C. 7702(f) at A- 24, I can sue the Merit Systems Protection Board, the correct agency, to appeal its decision of December 12, 1980 at A-6, if not also, because only two of the three board members decided this decision, and moreover, referred to an amendment found no where in the record, thereby, making its decision "clearly erroneous", and therefore, consequently, always appealable; see the MSPB worksheet, at A-7. Jurisdiction lies in the U.S. Claims Court or U.S. District Court under 8912 U.S.C. 5 at A-24, *Rosano v. United States,* 9 Cl.Ct. 137 (1985); *AFL-CIO v. Devine*, 525 F.Supp. 250 (D.D.C. 1981)[The U.S. District Court and the U.S. Claims Court has jurisdiction to decider the constitutionality of including mandatory coverage for abortion in the Federal Employees' Health Insurance Premium Benefits program under 8912 U.S.C. 5.], inter alia, under 18 U.S.C. 241, as applicable.

In 1980, pursuant to a letter I received on May 23, one week before termination, I have MSPB jurisdiction because I was terminated in the seventh month of probation, whereas pertinent Naval regulations require termination to begin no earlier than the beginning of the ninth month, thereof. 5 CFR 315.806(c). Yet, I have never raised this

argument before. I had presented my entire argument for MSPB jurisdiction in my writ presented to this Court in 1987. See *Rosano v. United States, supra*; 800 F.2d 1126 (Fed. Cir. 1986); 480 U.S. 907, cert. denied (1987). See also, *Rosano v. Dept. of the NAVY*, 699 F.2d 1315 (1983)[jurisdiction denied on other grounds].

CONNECTION BETWEEN THE MSPB AND THE IRS.

The connection between my appeal of the MSPB decision at Appendix A-6, and the case at bar becomes evident when you consider that I claim that I was terminated in a constructive discharge from Base Camp Pendleton, California, Marine Corp., The Navy, based on religious discrimination, precisely, because I was constructively denied enrollment into a "Constitutional" Federal Employees' Health Insurance Premium Benefits' ["FHB"] program because all FHB policies included mandatory coverage for abortion and contraception. *Rosano v. United States, supra*, held at 144 that "There is no 'fair interpretation' that an employee can sue for money, absent a denial of enrollment or benefits under a plan".

By reason, if this Court held, as a matter of law, that mandatory coverage for abortion and contraception places an unduly burden on the free exercise of religion, pursuant to *Sherbert* , if not more so, then, all FHB policies I had to choose from on November 7, 1979, the third day of my employment, before being assigned my first job order to perform, were unconstitutional, and thereby, I was denied enrollment, thereby, entitled to press my claim in the U.S. Claims Court. Below, I prove that the FHB paced a heavier burden than that found in *Sherbert*, yet, contrary to *Goehring v. Brophy, supra.* Under 5 CFR 1201.56(b)(3) at A-22, A-23, if I proved that the FHB was unconstitutional, my termination would be overturned, and my rights would be thereby vindicated. See explanation of 5 CFR 1201.56(b) at A- 23.

Important for this case, however, under 5 CFR 1201.56(b), I can raise my definition, thereof, as an affirmative defense, and apply it to my unlawful termination from federal employment, and, also, raise my new definition of a burden, thereof, as applied to the case at bar,

also, as an affirmative defense, in context, as well. This is the reason why I included *Rosano v. MSPB* at this time to catch the power of MSPB jurisdiction, an argument for jurisdiction of which was never raised before, until now. Both cases involve an unduly burden on the free exercise of religion, although in a different form. Both involve "federal" law, the Constitution, no less. Both affect the entire nation, including governmental funding of abortion and contraception which makes the FHB issue that much greater. Nonetheless, precisely and accurately, defining exactly what an unduly burden on the free exercise of religion is affects every aspect of American Life, no less RFRA, enacted by Congress in 1993, which does not now define what a burden on the free exercise of religion is. See The Restoration of Religious Freedom Act (RFRA), 42 U.S.C. 2000bb-2 Definitions.

The gravamen of my claim for reinstatement of my former job at Camp Pendleton, California, where I was, unlawfully, terminated in what was a constructive discharge, is that the FHB placed an unduly burden on the Free Exercise of Religion to the Federal First Amendment, as follows:

The ruling by the Office of Personnel Management, Washington, D.C., notwithstanding any statute, such as, perhaps 5 U.S.C. 8902(f) [disqualifying from otherwise available non-offensive-to-religion FHB benefits, Lawrence R. Rosano because of his refusal to be willing to accept the always-available temptation to violate religion in practice] forced him to choose between refusing to be willing to accept the always-available temptation to do, what both his employer and the United States Government are prohibited to force him to do, namely, to violate religion in practice by procuring abortion and/or contraception; in order to be eligible to receive all non-offensive-to-religion FHB benefits in question, and consequently, forfeit joining the FHB program, altogether, on the one hand, and be willing to accept the always-available temptation to do so, as indicated, above, in order to accept federal employment, on the other hand.

In comparison, to the contrary of the holding in *Goehring*; the FHB places a much greater burden on the free exercise of religion than existed in *Sherbert*. Because, what Mrs. Sherbert was forced to be willing to accept the possibility to do, yet, *in principle, only*, Lawrence

Rosano was forced to be willing to accept the possibility to do in practice; which, by observation, is a heavier temptation to avoid, and therefore, presents a heavier burden to resist than if assured there is no possibility to do so in practice, as appeared in *Sherbert*. This Court mentioned in *Sherbert* that the government's doing so, even though in principle, only, conditions the religious adherent to violate religion.

> "A similar argument was made and rejected in *Sherbert*, however. It is true that, as in *Sherbert*, the Indiana law does not *compel* a violation of conscience. But, 'this is only the beginning, not the end, of our inquiry.' 374 U.S., at 403-404. In a variety of ways we have said that '[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.' *Wisconsin v. Yoder*, 406 U.S., at 220, 92 S.Ct., at 1535. Cf. *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)."

Thomas v. Review Board, 450 U.S. 707, 717 (1981)

V.
PETITIONER IS ENTITLED TO REASONABLE ATTORNEYS' FEES, EVEN BEFORE THE CONCLUSION OF LITIGATION.

The Second Circuit, in effect, not only held to abridge my Federal First Amendment Right to Petition the Government for a Redress of Grievances, but, denied me the right to earn a living for the fruits of my labor, in the public interest, no less. The Second Circuit declared, as follows:

> "We address only appellant's argument that we should apply the doctrine of relation-back to gifts made to non-charitable donees where the donor has died prior to the payment of the gifts,"

Rosano v. United States, 245 F.3d 212, 213 (2nd Cir. 2001).

In 2000, as was done in our 1995 IRS Memo, I raised in my Amicus Curiae Memorandum on pages 7, 8 and 11, "pain and unambiguous" existing law, namely, *Bacchus v. United States*, *supra*, which followed *Estate of Spiegel v. Commissioner* [CCH Dec. 16,898

(M)], 12 T.C. 524 (1949)(citing cases, here, omitted)[two charitable gift checks related back, one issued in the year before the year cashed, but before the donor died, and the other issued in the same year, but before, yet cashed after, the donor died, added], acq'd, 1949-2 C.B. 3.

But, *Bacchus* is the law. Here's why: *Bacchus* was never appealed. Yet, had the Justice Department known that the U.S. District Court decided the related back doctrine, allegedly, erroneously, the U.S. Attorneys involved would have appealed *Bacchus*. At least, that is the presumption of regularity the Government follows, pursuant to *Abrahams*.

Moreover, as a governmental document, *Bacchus,* as I pointed out in my Amicus Curiae Memo on page 7, footnote #6, held this:

"No principled distinction can be drawn between these decisions and the issue presented here. The relation back doctrine squarely addresses both, and allows gifts [non-charitable gift checks, although all cashed prior to the donor-decedent's death, added] to be made deductible when intended, rather than when the check representing such gift is actually cashed - a matter beyond the donor's control."

Yet, in contrast, in 1987, the Tax Court criticized *Bacchus*, above, in *Estate of Gagliardi v. Commissioner*, 89 T.C. 1207, 1213, footnote #9, by declaring the following:

> "But see *Bacchus v. United States*, an unreported case (I). N.J. 1985. 57 A.F.T.R.2d 86-1519. 86-1 USTC par. 13,669)(extending relation back to noncharitable gifts without discussion of the distinction between charitable and noncharitable gifts)."

On analysis, though, a Tax Court has no jurisdiction, no less appellate jurisdiction, to review a decision by the U.S. District Court. Yet, arguendo, even if it had, *Abrahams* would hold *Bacchus* followed the law, which is a governmental document, no less. Therefore, under *Abrahams*, the *Gagliardi* Court could only challenge *Bacchus* by raising contrary substantial evidence of what the law is, but, certainly, not by raising its bald allegation that *Bacchus* was decided "without discussion of the distinction between charitable, and non-charitable,

gifts." Id., 1213. See *People v. Richetti*, 302 N.Y. 290, 97 N.E.2d 908, 912 (Ct.App. 1951).

Conclusively, under the Federal Rules of Evidence 803(6), -(7), the absence of evidence as to what was the distinction the *Gagliardi* Court had in mind, the *Gagliardi* decision is substantial evidence for the fact that there is no distinction, consistent with *Bacchus*. Moreover, this was especially important to me because, if based on "plain and unambiguous" existing law, then, under IRS regulations at A-18, I would be entitled to attorneys fees, even though as a non-lawyer, even though the award at that point was minimal compared to that claimed. Yet, I am entitled to even more of a legal fee.

> "Parties acting as private attorneys general should be reasonably compensated for their *vindication of the public policy* (emphasis, added) even if they themselves do not receive a large financial benefit.... It should not be expressed as a requirement that the fee award have a particular relationship to the amount of the monetary recovery."

Neece v. IRS, 94-2 USTC, paragraph 50,613, page 86,296.

Our 1995 IRS memorandum made another argument for a claim for my attorneys' fees. Yet, in addition, attorneys' fees should be granted to me, even tough I acted as an amicus curiae. See *Smith v. Fussenich*, 487 F.Supp. 628, 630 (D. Conn. 1980), citing "*United States v. Board of Education*, 605 F.2d 573, 576 (2nd Cir. 1979)["recognizing that the input from intervener and *amici curiae* can have significant value in achieving some of the benefits the parties sought in bringing suit."]. Moreover, I labored in the public interest, supplying what for over 38 years was lacking, not only in the area of religious freedom, but, as this case demonstrates, in the area of estate law, which will change the way the professionals handle the area of Estate Planning; according to Peter Corsentino, CPA.

In addition, in the Civil Rights area, I should be compensated for my legal development of the precise and accurate definition of *Sherbert*, even before a completion of the cases. See ironically, *Westside Woman's abortion clinic v. City of Cleveland*, 594 F.Supp.

though

299 (D. Ohio 1984) which held where non-attorneys were paid remuneration for years of litigation, achieving some success, even before the completion of litigation was over.

VI. EQUITABLE RECOUPMENT APPLIES TO GIFT CHECK #179

I was unable to present it because, although I was entitled to Plaintiff status, I was not recognized as a Plaintiff by the Second Circuit, in large amount, because my May 23rd, 2000 arrest and subsequent malicious prosecution upset my concentration, and thereby, was not permitted to file more pages that the 15 pages as amicus. Briefly, U.S. Attorney, Berkowitz, realized gift check #179 was treated by the IRS as a gift to Washburn, and the estate, therefore, paid gift tax on the $10,000 excess; but he argued that the $20,000 gift check was, rather, a constructive gift to me because Washburn did legal work for me, although doing so, Pro Bono, beforehand, at the time. Whereas, Washburn paid income tax on the same amount. The doctrine of equitable recoupment applies when taxes are paid on the same amount of money on two theories. *Kojes v. United States*, 36 F.R.D. 113, 115 (E.D.N.Y. 1964). Summary judgement never reflected the truth concerning gift check #179. This was a grave importance to me because, if a constrictive gift to me, and thereby, I constructively paid a legal fee to Washburn who was doing legal work on my trespass arrests and conviction, normally, I was not entitled to receive income tax deductions for Washburn's attorney fees. Yet, in 1993, in United States District Court, I, successfully, raised justification defenses to legitimized my conduct on campus at Adelphi University, pursuant to an order by trial judge Carol Amon, based on *Allen v. McCurry, supra*, overcoming the emergency to outlaw abortion and contraception coverage in group health insurance, and outlawing abortion and contraception, per se, if the Court would have recognized what actually was done at trial, namely, that I successfully raise justification defenses, per se, the legal proof of which is contained in my Memos in the Second Circuit in *Rosano v. Adelphi University.* I would be entitled to tax deductions for not only the $20,000 I constructively paid him, but for the larger amount of money I paid for criminal defense costs in attorneys fees since all those criminal cases supported the overturning of my unlawful termination in 1980 from federal civil

service, precisely, because the FHB was unconstitutional. This Court can decide this issue as a matter of law, which at this point is all it is.

VII. BENEFICIARIES' SUBSTANTIAL ADVERSE INTEREST ENTITLES THEM TO PREVAIL AS A MATTER OF LAW

This Court should hold, as a matter of law, that the beneficiaries had a substantial adverse interest, unique to all case law presented by defendant because the donor-decedent gifted away 25% of her estate, as indicated above, before she died which 25% does not include the gifts by check given to each beneficiary and Washburn, Esq. [#179 CMA] combined; as per IRS rules in 26 CFR 25.2514-3 at A-21, as raised in my Amicus Curiae memo on page 5 to page7.

WHY GRANT THIS WRIT

In summary, I never received my fair day in Court. Apparently, neither the IRS, nor the Courts, below, know the elements of a gift causa mortis. This Court should set the rule to do so. No statute defines exactly what a burden on the free exercise of religion is. For example, even RFRA {Restoration of Freedom of Religion Act] never did so under 42 U.S.C. 2000 bb-2, Definitions. Yet, by granting this petition for a writ, this Court should be surprised to find out that many of its prior applicable decisions on this subject of religious freedom, such as by denying certiorari in *Goehring v. Brophy, supra*, are "clearly erroneous" and must be either retried or overturned, or vacated, as the case may be. The American People deserve to find out all their Constitutional rights, whereas, now, for 38 years, in order to sue the government under the Free Exercise Clause to the Federal First Amendment, it appears to me that this Court hid the precise and accurate definition, thereof, to limit the religious freedom that *Sherbert* established in the first place.

For the first time in thirty eight (38) years since *Sherbert v. Verner, supra*, I have uncovered, as a matter of law, the precise and accurate definition of a burden on the free exercise of religion clause to the federal first amendment to the U.S. Constitution in order to, not only, precisely and accurately, apply the definition to other applications outside the context of unemployment compensation benefits, but in

order to compare the burden in question with others to ascertain the degree and type of burden, thereof, so helpful in deciding these cases.

As of now, without a precise and accurate definition, thereof, this discourages upholding Constitutional rights by (1) federal employees, such as I was in 1979, and unlawfully terminated in 1980, bound to follow The Code of Ethics For Government Service, and (2) the legislature. Yet, I dare say, now, the United States Supreme Court, owes it to the public interest to do so.

Next, this case is the first time any Court has reviewed New York State UCC 4-102, in context, applied to non-charitable gift checks for $10,000 per person per year when issued before, yet cashed after, the donor's death within the area of estate law. Doing so reverses the current, yet "clearly erroneous", case law by upholding the existing legislative intent under the circumstances; contrary to case law which has never considered it. The Courts have never considered IRS regulation 26 CFR 25.2511-2(a), either, which is a legislative intent that the IRS, in concert with estate, and estate planning, attorneys, are violating in the case at bar, as a policy under the color of the law.

In addition, the fact - absolutely unique to the facts as considered in all of the case law against the relation back doctrine, cited by Defendant-United States, and/or the Courts - is that my brother and I (Petitioner) held a substantial adverse interest, namely, over 25% of the total value of Mother's estate was donated as non-charitable gift checks, and issued out of a joint account between my brother, myself, and my Mother in the Merrill Lynch CMA account, considering 42 gift checks, and between my brother and my Mother in the bank account which only applied to the 4 Gallucci gift checks, as discussed. In addition, also, consider IRS regulation 26 CFR 25.2511-2(e) at A- 22 which implies the same. This Court has supervisory power to keep all lower courts' decisions consistent, but, by priority, first, consistent with the law, and then only, consistent with each other. Here, although the Courts seem consistent with each other, they are all wrong, as far as being consistent with the law. This raises, what to me for years appeared to be a "Catch 22" situation, where the State Court in Nassau County, in cahoots with the District Attorney, Denis Dillon, and/or Civil Court, violates federal Constitutional rights, based on

unconstitutional judicial rules which ensure corruption, applied to abridge my right to pursue justice in Federal Court, as is now the case, in this Court, and state criminal court.

CONCLUSION

For the foregoing reasons, the Petitioner is entitled to a new trial for his tax refund case, consistent with the final decision, raising, inter alia, equitable recoupment, after receiving the tax refund, penalty and interest, and my reasonable attorney's fees as a Pro Se non-attorney, besides that spent on attorneys. As a matter of law, all argument in my Amicus Curiae memorandum should be upheld, after deciding as a matter of law, that my definition of the burden on the free exercise of religion is the precise and accurate version, thereof, pursuant to *Sherbert*, and that the relation back doctrine applies, as well.

Also, this Court should remove my 1998 and 2000 Removal Actions, formerly filed in U.S. District Court to this Court, including the current criminal proceeding, in order to determine whether all courts lacked subject matter jurisdiction. This Court should set up rules for all lower Court's judicial rules, accordingly, to order the criminal court to decide discrimination cases under 1983 USC 42 in U.S. District Court, not local state criminal court, for the reasons, presented; order a new trial, pursuing civil rights claims of the parties under 42 U.S.C. section 1983 against Respondents IRS, etc.

Respectfully submitted,

LAWRENCE R. ROSANO, PRO SE,
1662 Lydia Avenue
Elmont, New York 11003
(516) 825-4949

Dated: Elmont, N.Y.
December 31, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 17, 2001 Decided: April 6, 2001)

Docket No. 99-6299

ROBERT ROSANO, as Executor of the Estate of Mary R. Rosano,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

VAN GRAAFEILAND, NEWMAN & LEVAL,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Seybert, *J.*) which ruled that gifts made via checks, that were written and delivered to the donee prior to the donor's death, but not paid by the bank until after the donor's death, were incomplete at the time of

the donor's death, and that the value of the checks had to be included in the estate for Estate Tax purposes.

Affirmed.

A. LAWRENCE WASHBURN, JR., New York, N.Y. *for Plaintiff-Appellant.*

MARION E.M. ERICKSON, Tax Division, Department of Justice, Washington, D.C. (Paula M. Junghans, Acting Assistant Attorney General, Richard Farber, on the brief, Loretta E. Lynch, United States Attorney, Of Counsel), *for Defendant-Appellee.*

VAN GRAAFEILAND, *Senior Circuit Judge*:

The parties do not dispute the facts, which are aptly summarized in the Report and Recommendation of Magistrate Judge Orenstein, which was adopted, with minor modifications, by Judge Seybert. *Rosano v. United States*, 67 F. Supp. 2d 113 (E.D.N.Y. 1999). This case concerns an attempt by the decedent, Mary Rosano, to decrease the amount of money in her taxable estate by making gifts of less than $10,000 to numerous relatives and friends. She did this by writing checks to relatives and friends. Mary Rosano died on January 21, 1990. The checks in question were not paid until after her death.

Rosano's executor did not include the amount of the disputed checks in the estate. The IRS conducted an audit and increased the value of the estate by the amount of the disputed checks, resulting in an additional estate tax liability of

$200,948.57. Additionally, the IRS imposed $35,349.00 in penalties plus $63,702.30 in interest. The estate paid these amounts in full, then filed a claim for a refund. The IRS denied the refund, and the estate filed the instant suit.

The case was assigned to Magistrate Judge Orenstein. Judge Orenstein stated that any gift of $10,000 or less that was "completed" prior to Mary Rosano's death should not be included in the estate. 67 F. Supp. 2d at 119. The issue, therefore, was whether checks that were paid after Mary Rosano died were "completed gifts". *Id.* Federal law provides that a gift is completed when the donor has parted completely with "dominion and control" over the gift. *Id.* To determine whether Rosano parted with dominion and control, Judge Orenstein turned to New York state law. Under New York law, Mary Rosano had the ability, at any time until the checks were paid, to order that payment on the checks be stopped. Thus, she retained dominion and control over the checks at the time of her death and the gifts were not completed. *Id.* at 120-21.

Judge Orenstein next considered the estate's argument that the checks should be considered to have been paid on the date they were delivered by Rosano to the donees, rather than on the date they were actually paid. The estate's argument was a variation on the doctrine of "relation-back," which generally is applied in cases involving charitable donations. Under it, checks delivered to donee charities prior to a decedent's death but not paid until after the decedent's death may be considered completed on the date of delivery. *Estate of Belcher v. Commissioner*, 83 T.C. 227 (1984). Recently this doctrine was extended to the non-charitable donation context, to govern whether a gift was made within a year in which it would be exempt from the gift tax, but in that case the donor was alive at the time the checks were paid. *Metzger v. Commissioner*, 38 F.3d 118 (4th Cir. 1994). The estate has pointed

to no court that has allowed payment to relate back to the date of delivery if the donor was deceased on the date of actual payment and the donee was not a charitable entity.

DISCUSSION

The decision below correctly resolves the arguments made by appellant. We address only appellant's argument that we should apply the doctrine of relation-back to gifts made to non-charitable donees where the donor has died prior to the payment of the gifts.

The doctrine of relation-back is entirely judicially created. *See id.* at 124 (Luttig, *J.*, dissenting). Accordingly, in evaluating appellant's argument, we have no easy recourse to legislative authority. Rather, we must evaluate the policy goals that led the courts to create the doctrine, and determine whether the goals are met by applying the doctrine in the instant case. We conclude that they are not.

Other courts have refused to apply the doctrine when the decedent died prior to payment of a non-charitable gift. *McCarthy v. United States*, 806 F.2d 129, 131-33 (7th Cir. 1986); *Newman v. Commmissioner*, 111 T.C. 81 (1998). In *McCarthy*, the court offered two reasons for its refusal to extend the doctrine of relation-back. First, a rationale for applying the doctrine in the charitable context was not present in the non-charitable context. Checks delivered by the decedent to a charity but not paid until after the decedent's death, if included in the estate, would generate a deduction for the estate. This deduction would result in a "wash" for estate tax purposes, meaning that the estate would obtain the benefit of the charitable deduction whether or not the doctrine of relation-back was applied. For practical purposes, it makes more sense to consider the checks as outside the estate. "No such practical consideration extends to non-charitable gifts. No offsetting deduction exists for gifts made

to noncharitable donees." *McCarthy*, 806 F.2d at 132. Second, the court thought that extending the doctrine would allow for improper tax avoidance: "By issuing a check to a noncharitable donee with the understanding that it not be cashed until after his death, a decedent may effectively bequest up to $10,000 per donee, thus avoiding the estate tax consequences normally attending such transactions." *Id.* *Accord Metzger*, 38 F.3d at 122.

We agree with the policy concerns expressed by the *McCarthy* and *Metzger* courts. Thus, we will not apply the doctrine where gifts are made to a non-charitable donee and the donor died prior to the date of payment. We express no opinion as to whether we would apply the doctrine where there is a non-charitable donee and the donor is alive on the date of payment.

Appellant argues that it violates the Equal Protection Clause to treat gifts made to charitable donees and non-charitable donees differently. This argument is meritless. From the first Revenue Act, Congress has consistently placed charitable and religious institutions in one class and non-charitable institutions in another. *First Nat'l Bank of Omaha v. United States*, 681 F.2d 534, 538 (8th Cir. 1982). Appellant's argument would invalidate a long history of statutory distinctions. Further, this Court has consistently upheld distinctions between charitable and non-charitable entities. *E.g.*, *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1167-68 (2d Cir. 1995); *Ad-Express, Inc. v. Kirvin*, 516 F.2d 195, 197-98 (2d Cir. 1975). The distinction is especially warranted in the context of a "relation back" claim because of the "wash" consequence for charitable gifts, which we have previously noted.

We have considered all of appellant's other arguments and find them to be without merit. The judgment of the district court is affirmed.

APPENDIX B

ORDER OF THE MERIT SYSTEMS PROTECTION BOARD DATED DECEMBER 12, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAWRENCE R. ROSANO

v.

MSPB Docket No.
SF315H8010134

DEPARTMENT OF THE NAVY
U.S. MARINE CORPS

ORDER

The Board, having fully considered appellant's petition for review of the initial decision issued on August 20, 1980, and finding that it does not meet the criteria for review set forth at 5 C.F.R. 1201.115, hereby DENIES the petition.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.115(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703, A, petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:
December 12, 1980

Robert E. Taylor
Secretary

Washington, D.C.

APPENDIX C

DECISION SHEET TO MSPB ORDER, December 12, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DECISION SHEET

IN THE MATTER OF:
Lawrence R. Rosano v. Navy (USMC) Probationary Termination
Docket No. SF315H801034

Staff Recommendation:
Petition for review denied.

REFERRED TO:
☐ Special Counsel ☐ OCC ☐ Special Decisions ☐ OA

Date _____ For the Board _____

TO BOARD: 11/28/80 DECISION DUE: 12/18/80

BOARD ACTION:

	Agree	Disagree	Modify	Date	Income Under Secretary's Signature Yes	Income Under Secretary's Signature No	Newsworthy Yes	Newsworthy No
Ruth T. Prokop, Chairwoman								
Ersa H. Poston, Vice Chair	See Inst. ✓		as modified	12 10 80	✓			✓
Ronald P. Wertheim, Member	✓		as modified	12 10 80	✓			

SECRETARY ACTION:
Issued by the Secretary pursuant to 20 day policy.

Date _____ Secretary _____

Date Returned to the Office of the Secretary: 12/12/80
Date Serviced by the Office of the Secretary: 12/12/80

APPENDIX D

New York State Uniform Commercial Code

§ 3-409. Draft Not an Assignment.

(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

§ 4-102. Applicability.

(1) To the extent that items within this Article are also within the scope of Articles 3 and 8, they are subject to the provisions of those Articles. In the event of conflict the provisions of this Article govern those of Article 3 but the provisions of Article 8 govern those of this Article.

§ 4-405. Death or Incompetence of Customer.

(1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for 10 days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

Official Comment

Prior Uniform Statutory Provision: None.

Purposes:

1. This section is new, although similar statutory provisions are

in existence in seven states.

2. Subsection (1) follows existing decisions which hold that a drawee (payor) bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. The justice and necessity of the rule are obvious. A check is an order to pay which the bank must obey under penalty of possible liability for dishonor. Further, with the tremendous volume of items handled any rule which required banks to verify the continued life and competency of drawers would be completely unworkable.

One or both of these same reasons apply to other phases of the bank collection and payment process and the rule is made wide enough to apply to these other phases. It applies to all kinds of "items"; to "customers" who own items as well as "customers" who draw or make them; to the function of collecting items as well as the function of accepting or paying them; to the carrying out of instructions to account for proceeds even though these may involve transfers to third parties; to depositary and intermediary banks as well as payor banks; and to incompetency existing at the time of the issuance of an item or the commencement of the collection or payment process as well as to incompetency occurring thereafter. Further, the requirement of actual knowledge makes inapplicable the rule of some cases that an adjudication of incompetency is constructive notice to all the world because obviously it is as impossible for banks to keep posted as to death of immediate or remote customers.

3. Subsection (2) provides a limited period after death during which a bank may continue to pay checks (as distinguished from other items) even though it has notice. The purpose of the provision, as of the existing statues, is to permit holders of checks drawn and issued shortly before death to cash them without the necessity of filing a claim in probate. The justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the

holder, the executor, the court and the bank.

This section does not prevent an executor or administrator from recovering the payment from the holder of the check. It is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment.

4. Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim or even whether it is "colorable". But obviously anyone who has an interest in the estate, including the person named as executor in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account.

APPENDIX E

New York State Judiciary Law
§ 487. Misconduct by Attorneys

An attorney or counselor who:

1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or,

2. Wilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for,

Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Added L.1965, c. 1031, § 123.

APPENDIX F

The Law of Bank Deposits, Collections and Credit Cards. Revised Edition. Barkley Clark & Barbara Clark. P 4.01 [1] [c]

[c] The Deathbed Gift Cases

In re Estate of Zatulove[30] involved a claim against the estate of a decedent-drawer for the amount of checks given as a gift prior to his death but not presented for payment until after the drawer's death. The checks were dishonored since the account had been frozen. The court held that the gift was incomplete and was revoked by the death of the drawer because there had been no delivery of the funds in the bank account. The court relied on the theory underlying § 3-409 that the mere writing of a check does not constitute an assignment of funds in the drawer's account and that no gift would thus be complete prior to final payment of the check.

As an interesting sidelight, § 4-405 authorizes a drawee bank to pay items or 10 days after receiving word of the drawer's death, but Comment 3 to that section makes it clear that the provision "is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment."

Holsomback v. Akins[31] is another interesting estate planning case in which a stepson sued his stepmother's estate for $7,000, the amount of a check she drew to his order shortly before her death, in settlement of what he had coming from his father, who had died a year earlier. As part of an apparent squeeze on the stepson, the stepmother's business associate had stopped payment on the $7,000 check shortly after the father's death and long before the stepmother expired. The drawee bank honored the stop payment order, even though its action was improper, because the business associate was neither the bank's customer nor a "person claiming an interest in the account" seeking to stop payment after the

drawer's death under § 4-405(2). A suit by the stepson against the bank on the check would have failed in any case, however, since there is no privity of contract between holder and drawee bank in the absence of certification. Therefore, the stepson filed his claim in the stepmother's estate on two theories: (1) Delivery of the check constituted a gift, and (2) the estate was liable on an independent contract theory.

As to the gift theory, the court correctly held that the gift was not complete until the check was paid by the bank, since a check does not constitute an assignment of funds under § 3-409. Therefore, receipt of the check following the death of the father and its failure to be paid prior to or after the death of the stepmother rendered the gift incomplete. By contrast, if the bank had paid the check after the stepmother's death pursuant to § 4-405, Comment 3 to that section suggests that the gift would be complete. As to the contract theory, the court concluded that the stepson would have an enforceable claim against the estate if he could prove that his father promised him the money, thus imposing a legally enforceable obligation on the stepmother, which she breached by seeing that payment was stopped on the item. Although such a contract theory would not necessarily be inconsistent with § 3-409, the obvious difficulty would be to show sufficient consideration or to protect the stepson as a third-party beneficiary.

A classic application of the general rule is found in *In re Estate of Bolton,*[32] where a gift of a $20,000 check from father to daughter was voided when the father died before the check was presented to (and dishonored by) the drawee bank. The check did not operate as an assignment of the father's funds in the account. Since the father's death acted as a revocation of his order to pay, the gift was not complete even though the check had been delivered. Moreover, the daughter could not recover against the estate since she did not qualify as a holder in due course, having failed to acquire the check for value.

As the prior cases illustrate, deathbed gifts are not favored in the law. They are a fruitful source of litigation, almost like the automatic will contest. They lack all the formalities that the law throws around wills, and they tempt fraud. Still, common law allows deathbed gifts (called gifts causa mortis) so long as three conditions are met: (1) The gift must be one of personal property; (2) the gift must be made in the donor's last illness, under a strong apprehension of death; and (3) possession of the property must be delivered at the time of the gift, or at least by the time of death.

In addition to the cases discussed previously, two recent cases-one from Virginia and one from Ohio-show how reluctant courts are to give effect to deathbed gifts, particularly when the property is a bank check. The delivery condition is the killer. In both cases, the gift was voided based on the rules of negotiable instruments and bank collections.

In *Smart v. Woo,*[33] the facts reflect Chinese cultural traditions that were negated by the UCC. Woo and Yee were longtime lovers. They often lived together and held themselves out as husband and wife. Two days before his death, Yee called Woo and told her he felt "terribly bad," he had a "heaviness" in his chest, and believed he would shortly die. That night he gave her two checks-one for $42,000 drawn on an account at Signet Bank and one for $80,000 drawn on an account at Central Fidelity Bank. He told her that if he died he wanted her to be taken care of. Yee died two days later. After Yee's death, Woo cashed the $42,000 check; the $80,000 was never cashed. The administrator of Yee's estate brought a declaratory judgment action against Woo seeking to recover the $42,000 and an order that the estate did not owe the $80,000. The issue before the court was whether the gift causa mortis was valid. The first two elements were easily established. It was clear from the facts that Yee intended to give Woo the funds represented by the checks. Moreover, he clearly was under apprehension of death. There was also no doubt that the gift was one of personal property. But was the gift effectively delivered

before Yee died? In finding that there was no effective delivery, the court focused on the no-assignment rule of the UCC. Thus, while pieces of paper were delivered, no *money* was delivered until the checks were paid by the drawee banks. An assignment of funds was necessary before delivery could be complete for purposes of making the gift.

The court looked at it this way: Until the checks are paid, the donor retains dominion and control over the funds, with power to issue a stop payment order and thus revoke the gift. This power to stop payment defeats the gift. Moreover, a check is nothing more than an order by the drawer to the drawee to pay funds to a third party, and this order is automatically revoked upon the drawer's death. Finally, until the check is paid, the donor may intentionally or inadvertently defeat the gift by any number of acts, including a stop payment order or a garnishment against the account. In short, there are simply too many contingencies to consider a gift as complete simply by delivery of the check. Therefore, Woo had to return the $42,000 and had no claim to the $80,000.

Woo argued that the rule of § 3-409 (1) is intended only to protect banks from liability to payees and other holders prior to final payment of checks, and that it should have no effect on the rules governing deathbed gifts. The court rejected that argument but never really answered it. Moreover, the court never cited § 4-405, which states clearly that death does *not* revoke the drawer's authority to pay an item. However, the Official Comment to that section states that "it is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of any liability for the payment." Perhaps it was correct to ignore the impact of § 4-405, yet rely on the no-assignment rule of § 3-409, which does not contain a similar Official Comment. In short, the court was probably correct in its decision, particularly given the traditional judicial hostility to deathbed gifts. Woo argued that such deathbed gifts are a tradition in China, where the writing of a will is thought to "tempt" death. Although respect-

ful of this tradition, the Virginia court felt that the law was settled on the requirement of delivery prior to the donor's death. There was no completed delivery in this case.

The Ohio case is *DeLuca v. BancOhio National Bank.*[34] In that case, a 78-year-old lawyer named Joseph Rotondo was dying of emphysema and related heart problems. On January 27, when he felt very ill, he called his secretary, Carolyn DeLuca, to take him to the hospital. They first stopped at his office where he signed several blank payroll checks that were on his desk. Before they left for the hospital, Rotondo told DeLuca that he had one blank check for her in his desk. On his deathbed that same day he asked how much she needed to pay her debts in full. She said $75,000. He told her that if he died she was to fill in the blank check on his desk for that amount.

After Rotondo died later that day, DeLuca went to the office, removed the blank check, filled it in for $75,000, and presented it for payment the next morning (Saturday) at the bank where they both had their accounts. Since the check was an "on-us" item, she asked the teller if it could be treated as a cash deposit for availability purposes. The deposit slip was changed to reflect a $75,000 deposit of "currency." The teller then electronically debited the Rotondo account and electronically credited the DeLuca account. No money ever changed hands over the counter. Under the bank's internal coding guidelines, the check had been cashed.

On Monday morning, the decedent's son obtained a temporary restraining order (TRO) ordering the bank to stop payment of the check prior to its midnight deadline. The bank dishonored the check and returned it to DeLuca with a notation that it had been bounced because of the TRO. DeLuca sued the bank on the ground that it had wrongfully removed the funds from her account after final payment had been made on Saturday morning.

The threshold issue as the court saw it was whether the bank had made final payment of the $75,000 check. The court found that final payment had been made because the bank had paid the item

in cash on Saturday morning. Payment in cash is indeed one of the milestones of final payment.[35] The court felt that it would be a meaningless gesture for the teller to give DeLuca $75,000 in currency, and then have her pass it back to the teller across the counter for deposit into her account. The court also cited § 4-403(1)(b), which states that a stop order or legal process comes too late if the item is paid in cash. On either ground, the court found that the TRO came too late.

But instead of validating the gift, the court bought the bank's "last line of defense"-that DeLuca breached her presentment warranty to the bank under § 4-207 because the item had been materially altered. Under § 3-407(2), completion of a bank item other than as authorized is a material alteration. In this case, the court found that DeLuca had no authority to fill in the incomplete check after the drawer died. On this critical point, the Ohio court (like the Virginia court) cited §3-409 for the proposition that a check is not of itself an assignment of funds.

In other words, the gift was not complete until payment, which took place after the drawer's death; by that time, the check could be completed only through a material alteration. Therefore, even though the check was finally paid before the TRO got to the bank, the donee lost. The key to the Ohio case, like the Virginia case, is that a gift is not complete by the mere drawing of a check, because the check is not an assignment of the donor's funds under the UCC.

APPENDIX G

Federal Rule of Evidence Rule 801(d)(2)

(d) Statements which are not hearsay
A statement is not hearsay if-

(2) Admission by party-opponent
The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Federal Rule of Evidence Rule 803 (6) and (7)

(6) Records of regularly conducted activity
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, was the regular practice of that business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6)
Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

APPENDIX H

26 CFR § 25.2511-2 Cessation of donor's dominion and control

(a) The gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer, nor is it conditioned upon ability to identify the donee at the time of the transfer. On the contrary, the tax is a primary and personal liability of the donor, is an excise upon his act of making the transfer, is measured by the value of the property passing from the donor, and attaches regardless of the fact that the identity of the donee may not then be known or ascertainable.

INTERNAL REVENUE CODE

5 U.S.C. § 7430. Awarding of costs and certain fees

(a) In general-In any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title, the prevailing party may be awarded a judgment or a settlement for-

(1) reasonable administrative costs incurred in connection with such administrative proceeding within the Internal Revenue Service, and

(2) reasonable litigation costs incurred in connection with such court proceeding.

(c)(3) **Attorneys' fees.-**

(A) In general.-For purposes of paragraphs (1) and (2), fees for the services of an individual (whether or not an attorney) who is authorized to practice before the Tax Court or before the Internal Revenue Service shall be treated as fees for the services of an attorney.

(B) Pro bono services.-The court may award reasonable attorneys' fees under subsection (a) in excess of the attorneys' fees paid or incurred if such fees are less than the reasonable attorneys' fees because an individual is representing the prevailing party for no fee or for a fee which (taking into account all the facts and circumstances) is no more than a nominal fee. This subparagraph shall apply only if such award is paid to such individual or such individual's employer.

(4) Prevailing party.-

(A) In general.-The term "prevailing party" means any party in any proceeding to which subsection (a) applies (other than the United States or any creditor of the taxpayer involved)-

(i) which-

(I) has substantially prevailed with respect to the amount in controversy, or

(II) has substantially prevailed with respect to the most significant issue or set of issues presented, and

(ii) which meets the requirements of the 1st sentence of section 2412(d)(1)(B) of title 28, United States Code (as in effect on October 22, 1986) except to the extent differing procedures are established by rule of court and meets the requirements of section 2412(d)(2)(B) of such title 28 (as so in effect).

[(iii) Redesignated (ii)]

(B) Exception if United States establishes that its position was substantially justified.-

(i) General rule.-A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applies if the United States establishes that the position of the United States in the proceeding was substantially justified.

(ii) Presumption of no justification if Internal Revenue Service did not follow certain published guidance.-

For purposes of clause (i), the position of the United States shall be presumed not to be substantially justified

if the Internal Revenue Service did not follow its applicable published guidance in the administrative proceeding. Such presumption may be rebutted.

(iii) Effect of losing on substantially similar issues.- In determining for purposes of clause (i) whether the position of the United States was substantially justified, the court shall take into account whether the United States has lost in courts of appeal for other circuits on substantially similar issues.

(iv) Applicable published guidance.-For purposes of clause (ii), the term "applicable published guidance" means-

(I) regulations, revenue rulings, revenue procedures, information releases, notices, and announcements, and

(II) any of the following which are issued to the tax payer: private letter rulings, technical advice memoranda, and determination letters.

(C) Determination as to prevailing party.-Any determination under this paragraph as to whether a party is a prevailing party shall be made by agreement of the parties or-

(i) in the case where the final determination with respect to the tax, interest, or penalty is made at the administrative level, by the Internal Revenue Service, or

(ii) in the case where such final determination is made by a court, the court,

APPENDIX I

§ 25.2514-3 Powers of appointment created after October 21, 1942.

(b) *Joint powers created after October 21, 1942.* The treatment of a power of appointment created after October 21, 1942, which is exercisable only in conjunction with another person is governed by section 2514(c)(3), which provides as follows:

(1) Such a power is not considered as a general power of appointment if it is not exercisable by the possessor except with the consent or joinder of the creator of the power.

(2) Such power is not considered as a general power of appointment if it is not exercisable by the possessor of a person having a substantial interest in the property subject to the power which is adverse to the exercise of the power in favor of the possessor, his estate, his creditors, or the creditors of his estate. An interest adverse to the exercise of a power is considered as substantial if its value in relation to the total value of the property subject to the power is not insignificant. For this purpose, the interest is to be valued in accordance with the actuarial principles set forth in § 25.2512-5 or, if it is not susceptible to valuation under those provisions, in accordance with the general principles set forth in § 25.2512-1. A taker in default of appointment under a power has an interest which is adverse to an exercise of the power. A coholder of the power has no adverse interest merely because of his joint possession of the power nor merely because he is a permissible appointee under a power. However, a coholder of a power is considered as having an adverse interest where he may possess the power after the possessor's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. Thus, for example, if X, Y, and Z held a power jointly to appoint among a group of persons which includes themselves and if on the death of X the power will pass to Y and Z jointly, then Y and Z are considered to have interests adverse to the exercise of the power in favor of X. Similarly, if on Y's death the power will pass to Z, Z is considered to have an interest adverse to the exercise of the power in favor of Y.

APPENDIX J

26 C.F.R. § 25.2511-2

(e) A donor is considered as himself having a power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom.

26 C.F.R. § 25.2511-1

(g)(1) Donative intent on the part of the transferor is not an essential element in the application of the gift tax to the transfer. The application of the tax is based on the objective facts of the transfer and the circumstances under which it is made, rather than on the subjective motives of the donor.

5 C.F.R. 1201.56 Burden and degree of proof, affirmative defenses

(a) Burden and degree of proof. (1) Agency: Under 5 U.S.C. 7701(c)(1) the agency action must be sustained by the board if:

(i) It is brought under 5 U.S.C. 4303 and is supported by substantial evidence; or

(ii) It is brought under any other provision of law or regulation and is supported by a preponderance of the evidence.

(2) *Appellant:* The appellant shall have the burden of proof as to issues of jurisdiction and timeliness of filing.

(b) *Affirmative defenses of the Appellant.* Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action by the

agency even where the agency has met the evidentiary standard set forth in subsection (a), above, in any case where the appellant:

(1) Shows harmful error in the application of the agency's procedures in arriving at such decision;

(2) Demonstrates that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302(b); or

(3) Shows that the decision was not in accordance with law.

APPENDIX K

Federal Register/Vol. 44, No. 127/Friday, June 29, 1979/ Rules and Regulations p. 38345

(Explanation of 5 C.F.R. 1201.56)

Section 1201.56 *Burden and degree of proof, affirmative defenses.*

A number of commentators have asserted that this proposed section appeared to place the burden of proof on the appellant. Since the statute requires precisely the opposite, the Board has made it clear that the burden of proof is on the agency. If the agency meets the burden of proof, the Board must sustain its decision. An exception to this rule occurs when the appellant can demonstrate one of three affirmative defenses. In that instance, the agency decision must be overturned even though the burden of proof has been met.

APPENDIX L

§ 7702. Actions involving discrimination

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, or petition as of the date it is filed with the proper agency.

Added Pub.L. 95-454, Title II, § 205, Oct. 13, 1978, 92 Stat. 1140, and Amended Pub.L. 96-54, § 2(a)(46), Aug. 14, 1979, 93 Stat. 384.)

§ 8912. Jurisdiction of courts

The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter.

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 607; Pub.L. 97-164, Title I, § 160(a)(3), Apr. 2, 1982, 96 Stat. 48; Pub.L. 102-572, Title IX, § 902(b)(1), Oct. 29, 1992, 106 Stat. 4516.

APPENDIX M

TSSG
Dreyfus Family of Funds
P.O. Box 9671
Providence, RI 02940-9671

December 26, 1991

Lawrence R. Rosano
1662 Lydia Ave
Elmont, NY 11003

Re:Dreyfus 100% U.S. Treasury Long Term Fund, L.P.
Account Number: 073-1001167277

Dear Mr. Rosano:

We are contacting you in regards to the above referenced account.

You have been proviously informed of an overpayment in the amount of $28, 607.69 which occurred on March 13, 1990. Because you have failed to take action to resolve this matter, we plan to report the proceeds, received by you, to the Internal Revenue Service (IRS) via Form 1099-Misc.

In Order to prevent this information from being filed with the IRS, The Shareholder Services Group must have full resolution to this debt by January 16, 1992.

Please send your check, made payable to The Shareholder Services Group, for the full amount to:

The Shreholder Services Group
Attn: Susan Hall PRO2
One American Express Plaza
Providence, RI 0203-1135

If you have any questions, please call me, collect, (401) 454-9317, Monday though Friday, between 7:30 a.m. and 4:00 p.m., Eastern Time.

Sincerely,

Susan Hall
Reclaim Administrator

APPENDIX N

Special Counsel investigations of a pattern of prohibited practices

The Senate bill provides that if the Special Counsel believes that there is a pattern of prohibited personnel practices by any agency or employee and such practices involve matters which are not otherwise appealable to the Board under section 7701, the special counsel may seek corrective action by filing a written complaint with the Board. For example, there may be hiring or promotion practices which violate merit system principles but which may not give rise to an appealable action under this title. Similarly competitive examinations may be administered in such a way as to constitute a violation of section 2302. Under this paragraph, the Special Counsel would have authority to seek corrective action, and the Board is empowered to order such corrective action as it finds necessary.

The House amendment contains no comparable provision.

The conference substitute in section 1206 (h) adopts the Senate provision. By adopting this provision, the conferees do not intend to divest the Civil Service Commission's Bureau of Personnel Management Evaluation or its successor unit in the Office of Personnel Management of its present functions including its authority to order corrective actions. The Senate bill makes it a prohibited personnel practice to grant any preference or advantage not authorized by law, rule, or regulation to any person for the purpose of improving or injuring the prospects of any particular individual or "category of individuals." The substitute omits this phrase but it is expected that a pattern of activities disadvantaging a category of individuals would be actionable under this subsection.